APPENDIX A

OPINION OF COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT DALLAS

No. 16,729

BROWNWOOD MANUFACTURING COMPANY, et al.,
Appellants,

v.

TANENBAUM TEXTILE COMPANY, INC.,
Appellee.

From a District Court of Dallas County, Texas

Summary judgment was rendered in favor of appellee Tanenbaum Textile Company, Inc. against the appellants Brownwood Manufacturing Company and Gillsam Manufacturing Company, Inc. for $39,897.49 and $40,562.12, respectively. Appellee's suit against appellants was based on a judgment of the Supreme Court of the State of New York in and for New York County. The New York judgment was rendered in confirmation of certain awards made by a board of arbitration. Appellants say by their two points of error that the New York judgment is void and not binding on

them, and not entitled to full faith and credit in this Texas suit, because they were not served with process in the New York proceeding.

FACTS

Appellants manufactured clothing out of textiles supplied by appellee under written contracts, paragraph 16 of which provided:

> "ARBITRATION: Any controversy relating to this contract shall be settled by arbitration. Arbitration shall be held in the City of New York in accordance with the rules then obtaining of the General Arbitration Council of the Textile Industry. Buyer and Seller consent to the jurisdiction of the Supreme Court of the State of New York and further consent that any process or notice of motion or any application to the Court, including application for judgment upon an award, may be served outside the State of New York by registered mail or by personal service provided a reasonable time for appearance is allowed."

Disputes arose between the parties—appellee claiming the purchase price of certain materials, and appellants claiming damages on account of defective materials and tardy deliveries. Pursuant to the contracts, these claims were submitted to arbitration in New York City. The appellants were represented by a lawyer named Lazarus and appellee by a lawyer named Whyman, both of New York City.

As attorney for the appellants here, Lazarus first requested the Arbitration Council of the Textile Industry to consolidate and hear together the several claims, and on being informed that the Council was without power to do so except

by agreement, and Whyman having refused to agree to it, Lazarus then filed in the Supreme Court in and for New York County a motion to consolidate the claims. The expressed purpose of this motion was to save appellants the unnecessary expenditure of time and money in making numerous trips to New York with their witnesses for hearings on the separate claims. Appellants knew of this motion and approved of its filing. Appellee's attorney, Whyman, vigorously resisted the motion, but it was granted. Arbitrators heard the claims and made awards to appellee against the appellants for substantial amounts. In due time Whyman filed a motion in the same numbered proceeding in which Lazarus had previously filed his motion to consolidate, asking that the awards be confirmed and judgment rendered thereon. Notice of this motion was served on Lazarus as attorney of record for the appellants. Lazarus sent copies of the motion and of the awards to appellants. He then filed two affidavits in opposition to the motion to confirm and for judgment, and sent copies thereof to appellants. In those affidavits he described himself as attorney for appellants. Appellants gave him no specific instructions in the matter after the awards in arbitration were made; neither did they protest his having accepted service of the motion to confirm and for judgment or question his authority to enter their appearances thereto. The awards were confirmed and judgment rendered thereon by the Supreme Court; this being the judgment sued on in this case.

Pursuant to requests therefor made under Rule 184a, Vernon's Texas Rules of Civil Procedure, the trial court took

judicial notice of certain New York laws, the pertinent portions of which are as follows:

Article 75, of the Civil Practice Law and Rules (C.P.L.R.), relates to arbitrations. Section 7501 thereof reads:

> "A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. * * *"

The last sentence of Section 7506(d) is:

> "If a party is represented by an attorney, papers to be served on the party shall be served upon his attorney."

Section 7510 reads:

> "The court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in Section 7511."

Section 7514 provides in part:

> "*Sec. 7514. Judgment on an award.*
>
> "(a) Entry. A judgment shall be entered upon the confirmation of an award."

Rule 320, C.P.L.R., provides that the "defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer."

Rule 2103(b) provides that, except where otherwise prescribed by law or order of court, "papers to be served upon

a party in a pending action shall be served upon his attorney."

Appellants, on advice of their Texas attorney, took no active part in the New York proceedings after the awards were made and take the position here that Lazarus had no authority to enter an appearance for them in the New York court; that he was employed to represent them in the arbitration proceedings up to the making of the awards, and that thereafter he had no authority to act for them. Lazarus testified by deposition that in filing his affidavits in opposition to the motion to confirm and for judgment he thought in good faith that he was authorized to do so; that he was employed by appellants to represent them generally in the arbitration proceedings for an agreed flat fee; that he charged no additional fee for resisting the motion to confirm and for judgment because he considered it all a part of the work he was employed and paid to do.

OPINION

When appellants entered into these written contracts providing for arbitration in New York, they were charged with notice of the New York laws pertaining to arbitration and consented to be bound thereby. Appellants now say, however, that their consent was limited strictly to the matter of arbitration, and that when appellee's counsel filed the motion for confirmation of the awards and for judgment thereon this was the filing of a new suit, of which they were entitled to be notified by summons or citation served on them personally within the limits of the State of New York,

citing Pennoyer v. Neff, 95 U.S. 714, and that when the awards were made by the arbitration board the attorney-client relationship theretofore existing between them and Mr. Lazarus came to an end.

The above mentioned New York statutes, as well as the above quoted paragraph 16 of the contracts between the parties, specifically recognize that the application for judgment upon an award is a part of the arbitration proceeding. This is in harmony with the New York decisions. See Mossman v. Motor Vehicle Acc. Indemnification Corp., 244 N.Y.S. 2d 565, holding that the motion to confirm "finalizes the arbitration award and is therefore an integral part of the arbitration procedure necessary to protect the interests of the parties."

The New York cases seem to be uniform in holding that an agreement to arbitrate within a given jurisdiction is a submission to the law and courts of that jurisdiction and to any procedures in that jurisdiction necessary to bring the arbitration to an effective conclusion. Application of Liberty Country Wear, Inc., 96 N.Y.S. 2d 134.

See also Stanley J. Staklinski, Petitioner-Respondent, and Pyramid Electric Co., Respondent-Appellant, 180 N.Y.S. 2d 20, affirmed 188 N.Y.S. 2d 541, 160 N.E. 2d 78, wherein it was said:

> "There was an agreement to arbitrate in accordance with rules of the American Arbitration Association and, pursuant to such rules, New York was selected as the locale for the hearing. It constituted, in effect, a consent of the parties to the jurisdiction of the Supreme Court of this state to enforce such contract."

As held in Aarons v. Local 32-E, Building Service Employees International Union, 82 N.Y.S. 2d 262, in submitting to arbitration a party must be deemed to have put in a general appearance in a special proceeding and to have waived any question of jurisdiction.

Moreover, in our opinion appellants are also bound by the fact that their own attorney, while admittedly authorized to represent them, and with their knowledge and consent, invoked the jurisdiction of the New York court to compel appellee, over its vigorous protest, to consolidate its claims and try them in one proceeding. They are in no position now to deny the authority of that court to render an *in personam* judgment against them.

We do not think due process has been denied appellants in this case. After voluntarily submitting themselves to the New York laws and the jurisdiction of its courts, not only by their written contracts but by invoking the jurisdiction of the very court whose judgment they now say is void, and after notice of the motion to confirm and for judgment was served upon their attorney and they were informed of this fact and of their attorney's opposition thereto, they remained silent and let the hearing of the motion be held without further protest or objection, apparently willing to accept the benefits if the efforts of Mr. Lazarus were successful, but now say they are not bound by the unfavorable result. This the law does not permit them to do. Baughan v. Goodwin, Tex. Civ. App., 162 S.W. 2d 732, wr. ref. w.o.m.

Being of the opinion that the summary judgment was correct, we affirm it.

AFFIRMED.

.....

BATEMAN, *Associate Justice*

DELIVERED:

May 20, 1966.

APPENDIX B

Special exception in Answer of Petitioner Brownwood Manufacturing Company:

> E. That the Supreme Court of the State of New York acquired no jurisdiction over the person of this Defendant, and said Judgment is in violation of the 14th Amendment to the Constitution of the United States and has deprived Defendant of its due process of law. (R. Sec. A, p. 54)

Special exception in Answer of Petitioner Gillsam Manufacturing Company, Inc.:

> E. That the Supreme Court of the State of New York acquired no jurisdiction over the person of this Defendant, and said Judgment is in violation of the 14th Amendment to the Constitution of the United States and has deprived Defendant of its due process of law. (R. Sec. A, p. 67)

Petitioner Brownwood Manufacturing Company's Answer to Respondent's Motion for Summary Judgment:

> (6) That said judgment is in violation of the Fourteenth Amendment to the Constitution of the United States, and has deprived Defendant of its due process of law. (R. Sec. A, p. 24)

Petitioner Gillsam Manufacturing Company, Inc.'s Answer to Respondent's Motion for Summary Judgment:

> (6) That said judgment is in violation of the Fourteenth Amendment to the Constitution of the United States, and has deprived Defendant of its due process of law. (R. Sec. A, p. 29)

Affidavit of principal officer of Brownwood Manufacturing Company attached to Petitioner's Answer to Respondent's Motion for Summary Judgment:

No. 89,279-D/H
Tanenbaum Textile Co., Inc.
v.
Brownwood Manufacturing Co., et al.
In the 160th Judicial District Court of
Dallas County, Texas

Affidavit of Joseph Sidran

THE STATE OF TEXAS:
COUNTY OF DALLAS:

Before me, the undersigned authority, a Notary Public in and for said County and State, on this day personally appeared JOSEPH SIDRAN, who, after being duly sworn, stated on his oath as follows:

"My name is Joseph Sidran. I am a resident of Dallas County, Texas. I am President of Brownwood Mfg. Co. This Company is a Texas Corporation with principal office in Dallas County, Texas, and factory at Brownwood, Texas.

"Controversies arose between this Company and Tanenbaum Textile Co., Inc. on contracts for fabrics, and under the terms of the contracts, Tanenbaum Textile Co., Inc. requested arbitration before the General Arbitration Council of the Textile Industry. At the same time it also requested arbitration of a dispute with Gillsam Mfg. Co., Inc. and Sidran Sportswear, Inc. These are all separate and independent Texas Corporations. I had no financial interest in Gillsam Mfg. Co., Inc., owned no stock therein, and was not an officer or director thereof. Brownwood Mfg. Co. employed Lester A. Lazarus, a New York attorney, to represent it in such arbitration proceedings before such Arbitration Board. Since a number of contracts were involved, and since

he likewise represented Gillsam Mfg. Co., Inc. and Sidran Sportswear, Inc., and since it would have required many trips for separate hearings, he was authorized to request a consolidation of such claims insofar as having them all heard by one panel and in consecutive order. The Board said it had no authority to consolidate, and a petition was filed in the Supreme Court by Mr. Lazarus in a special proceeding in the nature of a motion to authorize such consolidation and a show cause order was served upon Tanenbaum Textile Co., Inc. The Court entered an order consolidating such cases, and no appeal was taken, and so far as I know this ended the special proceedings in that case.

"That all of the activities of Brownwood Mfg. Co. are confined to the State of Texas. It does not do business in New York. Merchandise manufactured by it is shipped into interstate commerce to various branches of the United States Government, with whom it contracts to manufacture certain garments. It also purchases from Texas raw materials from outside the State of Texas.

"Brownwood Mfg. Co. has no agent for service except in the State of Texas. It was never served with a citation in said suit in the Supreme Court of the State of New York, which said Court entered a judgment against it. That Brownwood Mfg. Co. never authorized Mr. Lazarus, or any other person, to accept service upon it in said suit. That Brownwood Mfg. Co. could not be served in said suit by serving the attorney representing it in the arbitration proceedings.

"It was my understanding that when the arbitration award was made by the Board suit for enforcement would be brought in Texas, where personal service could be had on the Company. I was informed by my counsel in Dallas, Emil Corenbleth, that service in a suit for a money judgment must be personal service and under Texas law, since the Company did no business in New York, and its offices were not in New York, and suit would be brought here in Texas.

"I did not authorize, nor did the Company or any of its officers or directors authorize, Mr. Lazarus to accept service in New York for the Company or file any motions or proceedings in said suit. I am not familiar with New York laws, nor why Mr. Lazarus was served.

"I believe the Company is entitled to its day in Court. When the Company was served in Texas in the above cause now in the 160th District Court, I learned of this judgment against the Company, which was entered without service on the Company. I understand that the cause number of the New York case is 16475/1963."

Signed this 12th day of February, A.D. 1965.

/s/ JOSEPH SIDRAN

Joseph Sidran

SUBSCRIBED AND SWORN TO BEFORE ME BY JOSEPH SIDRAN, This the 12th day of February, A.D. 1965, to certify which witness my hand and seal of office.

/s/ R. L. CROCKER

Notary Public, Dallas County, Texas

ENDORSEMENT ON INSTRUMENT

No. 89,279-D/H

Tanenbaum Textile Co., Inc. v. Brownwood Manufacturing Co., et al.

DEFENDANT BROWNWOOD MFG. CO.'S ANSWER TO PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT AND AFFIDAVIT OF JOSEPH SIDRAN

Filed: February 17, 1965

BILL SHAW, *District Clerk*

/s/ MCCORMICK, *Deputy*

Dallas County, Texas
(R. Sec. A, pp. 25-27)

Affidavit of principal officer of Gillsam Manufacturing Co., Inc.:

No. 89,279-D/H
Tanenbaum Textile Co., Inc.
v.
Brownwood Manufacturing Co., et al.
In the 160th Judicial District Court of
Dallas County, Texas

Affidavit of Sam E. Giller

THE STATE OF TEXAS:
COUNTY OF DALLAS:

Before me, the undersigned authority, a Notary Public in and for said County and State, on this day personally appeared SAM E. GILLER, who after being duly sworn, stated on his oath as follows:

"My name is Sam E. Giller. I am a resident of Dallas County, Texas. I am President of Gillsam Mfg. Co., Inc. This Company is a Texas Corporation with principal office in Dublin, Erath County, Texas.

"Controversies arose between this Company and Tanebaum Textile Co., Inc. on contracts for fabrics, and under the terms of the contracts Tanenbaum Textile Co., Inc. requested arbitration before the General Arbitration Council of the Textile Industry. At the same time it also requested arbitration of a dispute with Brownwood Mfg. Co. and Sidran Sportswear, Inc. These are all separate and independent Texas Corporations. I had no financial interest in Brownwood Mfg. Co. and Sidran Sportswear, Inc., owned no stock therein, and was not an officer or director thereof. Gillsam Mfg. Co., Inc. employed Lester A. Lazarus, a New York attorney, to represent it in such arbitration proceedings before such Arbitration Board. Since a number of contracts were involved, and since he likewise represented Brownwood Mfg. Co. and Sidran Sportswear, Inc., and since it would have required many trips for separate hearings, he was authorized to request a consolidation of such claims insofar as having all them all heard by

one panel and in consecutive order. The Board said it has no authority to consolidate, and a petition was filed in the Supreme Court by Mr. Lazarus in a special proceeding in the nature of a motion to authorize such consolidation and a show cause order was served upon Tanenbaum Textile Co., Inc. The Court entered an order consolidating such cases, and no appeal was taken, and so far as I know this ended the special proceedings in that case.

"That all of the activities of Gillsam Mfg. Co., Inc. are confined to the State of Texas. It does not do business in New York. Merchandise manufactured by it is shipped into interstate commerce to various branches of the United States Government, with whom it contracts to manufacture certain garments. It also purchases from Texas raw materials from outside the State of Texas.

"Gillsam Mfg. Co., Inc. has no agent for serivce except in the State of Texas. It was never served with a citation in said suit in the Supreme Court of the State of New York, which said Court entered a judgment against it. That Gillsam Mfg. Co., Inc. never authorized Mr. Lazarus, or any other person, to accept service upon it in said suit, That Gillsam Mfg. Co., Inc. could not be served in said suit by serving the attorney representing it in the arbitration proceedings.

"It was my understanding that when the arbitration award was made by the Board suit for enforcement would be brought in Texas, where personal service could be had on the Company. I was informed by my counsel in Dallas, Emil Corenbleth, that service in a suit for a money judgment must be personal service and under Texas law, since the Company did no business in New York, and its offices were not in New York, and suit would be brought here in Texas.

"I did not authorize, nor did the Company or any of its officers or directors authorize, Mr. Lazarus to accept service in New York for the Company or file any motions or proceedings in said suit. I am not famil-

iar with New York laws, nor why Mr. Lazarus was served.

"I believe the Company is entitled to its day in Court. When the Company was served in Texas in the above cause now in the 160th District Court, I learned of this judgment against the Company, which was entered without service on the Company. I understand that the cause number of the New York case is 16475/1963."

Signed this 12th day of February, A. D. 1965.

/s/ Sam E. Giller

Sam E. Giller

SUBSCRIBED AND SWORN TO BEFORE ME BY SAM E. GILLER, This the 12th day of February, A. D. 1965, to certify which witness my hand and seal of office.

/s/ Bette Rogers

NOTARY PUBLIC, DALLAS COUNTY, TEXAS

My commission expires: 6/1/65

BETTE ROGERS
111 Braniff Bldg.,
Dallas, Texas

ENDORSEMENT ON INSTRUMENT
No. 89,279-D/H

Tanenbaum Textile Co., Inc. vs. Brownwood Manufacturing Co., et al

DEFENDANT GILLSAM MFG. CO., INC.'S ANSWER TO PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT

Filed: February 17, 1965
Dallas County, Texas

BILL SHAW, District Clerk
/s/ McCormick, Deputy

(R. Sec. A, pp. 30-32)

Judgment of the 160th District Court, Dallas County, Texas, in Cause No. 89279-D/H:

BE IT REMEMBERED that on the 2nd day of September, 1965 there came on to be heard plaintiff's second motion for summary judgment, and the defendants, Brownwood Manufacturing Co. and Gillsam Manufacturing Co., Inc., having filed answers thereto and having made their appearances before the Court for all purposes, and the said plaintiff, appearing by and through its duly authorized attorney of record in this cause, viz. G. H. Kelsoe, Jr., and the defendants, appearing by and through their duly authorized attorney of record in this cause, viz. Emil Corenbleth, appeared in person and submitted said motion to the Court for its determination; and the Court, having expressly found that it was vested with jurisdiction of the parties and of the subject matter, thereupon took plaintiff's second motion for summary judgment under advisement for the purpose of studying the depositions, the exhibits, the affidavits, the transcript of proceedings in the lawsuit in the Supreme Court of the State of New York, the judgment of the Supreme Court of the State of New York rendered on May 18, 1964, and all other data and information duly filed in this cause, together with several notices and motions in accordance with Rule 184a to take Judicial notice of certain laws of the State of New York; and the Court, after considering the record in this cause, is of the opinion, that plaintiff's second motion for summary judgment should be granted, and that the judgment of the Supreme Court of the State of New York rendered on May 18, 1964, same being index number 16,475/1963, is entitled to full faith and credit under the laws of the State of Texas.

BE IT THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff, Tanenbaum Textile Co., Inc., do have and recover judgment of and from the defendant, Brownwood Manufacturing Co., for the sum of $39,897.49, plus legal interest at the

rate of six percent per annum, and that plaintiff do further have and recover judgment of and from the defendant, Gillsam Manufacturing Co., Inc. for the sum of $40,562.12, plus legal interest at the rate of six percent per annum.

BE IT FURTHER ORDERED, ADJUDGED AND DECREED that all costs of court shall be taxed one-half against the defendant Brownwood Manufacturing Co. and one-half against the defendant Gillsam Manufacturing Co., Inc., for all of which let execution and such other writs as are necessary to enforce this judgment in conformity with the law issue.

To which action of the Court the defendants, and each of them, Brownwood Manufacturing Co. and Gillsam Manufacturing Co., Inc., duly and timely excepted and gave notice of appeal to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, sitting at Dallas, Texas

Signed and rendered this 11th day of October, 1965.

/s/ Hoyet A. Armstrong

Judge

ENDORSEMENT ON INSTRUMENT NO. 89279-H
Tanenbaum Textile Co., Inc. vs. Brownwood Manufacturing, et al

FINAL JUDGMENT
Recorded: Volume R, Page 385
In the Minutes of the 160th Judicial District Court
(R. Sec. A, pp. 80-81)